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Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

RENNOLD PENDER,
Plaintiff and Appellant,

VS.

ELLIS I. ANDERSON and EVA ANDERSON,
his wife, BERT CENTER and JANE
DOE CENTER, whose true name is
unknown, his wife, ALLIANCE REAL-
TY & BUILDING Co., a corporation,
also all other persons unknown
claiming any right, title, estate or
interest in or lien upon the real
property described in the complaint
adverse to plaintiff's ownership or
clouding plaintiff's title, thereto,
Defendants and Respondents.

Case No. 7638

FILED BRIEF OF APPELLANT
JUN 13 1951

Clerk, Supreme Court, Utah

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Case No. 7638

BRIEF OF APPELLANT

STATEMENT OF FACTS

This was an action to quiet the title to certain Salt Lake County realty, brought by plaintiff and appellant. Rennold Pender (Rec. 1-3), as assignee of Dr. G. Mur-

ray Edwards (Rec. 34, 87-88, Ex. "A"), to rescind as fraudulent a deed to defendant and respondent Bert Center, and to set aside a tax title acquired by defendant and respondent Alliance Realty and Building Company (Rec. 31-32, Ex. "A", Entries 5, 9, 11), as being based on an invalid tax sale (Rec. 44-45, 77).

It appeared that Dr. G. Murray Edwards, a resident of Denver, Colorado, acquired title to Lots 11, 12, 13, Block 1, Davis, Sharp & Stringers Addition to Salt Lake City, Salt Lake County, Utah, by deed dated February 17, 1915, recorded February 23, 1917 (Rec. 31, 86, Ex. "A", Entry 1). Mr. Edwards was a physician, and had as a patient over the period of the years 1929-1935, one Bert Center (Rec. 86, 95), with whom he became very friendly (Rec. 100-101). Dr. Edwards, being desirous of disposing of the above lots, mentioned the matter to Mr. Center, who was planning on going west, and who offered to try to make a sale or disposition of them for the doctor (Rec. 86), and obtained from the latter a deed to enable him to deal with the ground, said deed being dated June 10, 1935, and recorded by Mr. Center June 14, 1935 (Rec. 86, 96-97, Ex. "A", Entry 6; Ex. 5). According to Dr. Edwards, the deed was executed to enable Mr. Center to make a sale or disposition of the lots, and not otherwise, and upon any sale, Mr. Center was to remit the proceeds, and receive a commission (Rec. 87-88), and Dr. Edwards, relying upon the representations of Mr. Center would not have executed or delivered the instrument in question except upon the premises that the ground was to be sold and that he was to receive the

proceeds. No money or other form of consideration was paid or given for the deed (Rec. 87) and Bert Center, himself, admits (Rec. 100), there was no contemporaneous transfer or payment of cash or other consideration given for the deed at the time of the delivery of same to him, but, contrary to the doctor's testimony, claims that the deed was given to him as compensation for services previously rendered gratuitously for Dr. Edwards in looking up the status of some oil leases or oil stock in Texas, which services were performed with no thought of charging therefor at the time they were accomplished. Taxes were not paid by either the doctor or Mr. Center, and the lots in question were sold to Salt Lake County for delinquent taxes on a four year sale under date of March 18th, 1936 (Rec. 32, Ex. "A", Entry 7), and thereafter. defendant-respondent Ellis I. Anderson acquired the tax title from Salt Lake County under date of April 10th, 1946 (Entry 9, Exhibit "A", Rec. 32), and later, joined by his wife, the defendant-respondent, Eva P. Anderson, conveyed this tax title to defendant-respondent Alliance Realty and Building Company, on August 6, 1947 (Rec. 33, Exhibit "A", Entry No. 11). Dr. Edwards, joined by his wife Nella Edwards, deeded his interest in the ground to Rennold Pender, (Rec. 32, Exhibit "A", Entry 8), and executed an assignment of his cause of action to rescind against Bert Center to plaintiff-appellant Pender (Rec. 34, 88, Ex. "A", last entry). Thereupon this action was commenced (Rec. 1-3), and proceedings entering default of Bert Center and the Andersons were had (Rec. 21-22). Later, Dr. Ed-

ward's deposition was taken, when the attorney for Alliance Realty and Building Company located Bert Center, had his default set aside (Rec. 69-80, 85), entered an appearance for him, and engineered an arrangement to give defendant-respondent Center a fifth interest in the ground, if the latter would go along with the defendant, Alliance Realty and Building Company (Rec. 79, 102, 106, Ex. "C"). The cause proceeded to trial on documentary evidence of title, and the respective depositions of Dr. G. Murray Edwards (Rec. 86-89, Ex. "B"), and Bert Center (Rec. 94-107). The Court, having heard the evidence, indicated that if it believed the plaintiff's case as exemplified by the testimony of Dr. Edwards, it would be constrained to set aside the deed to Center, and find for the plaintiff-appellant; but, instead of so doing and deciding on the merits, ruled that plaintiff had not produced enough evidence to sustain the burden of proof, and gave judgment of dismissal in favor of defendants (Rec. 109, 15-16). From this judgment and decree, and the denial of a motion for a new trial, plaintiff-appellant prosecutes this appeal (Rec. 114.).

A R G U M E N T

POINT I. THE TRIAL COURT ERRED IN FAILING TO DECIDE THE ISSUE OF FRAUD ON THE MERITS OF THE CASE, RATHER THAN PREDICATING ITS DECISION ON LACK OF BURDEN OF PROOF.

(A) *The facts are clear, convincing, and decisive.*

The facts in this case are not complicated. They are simple, direct, and convincing. It is clear that the defendant Center obtained a deed in his favor (or in blank, in which his name was later inserted) to enable him to deal with the lots described as belonging to Dr. Edwards. It is clear that no value was paid, or no other consideration was given to procure the delivery of the deed—and, this is beyond all doubt definitely and decisively admitted by the defendant Center. It is clear that Dr. Edwards would not have parted with his title, except on reliance of the representations that defendant Center might be able to turn a deal on the lots, remit the purchase price, and earn a commission. It is clear that a mutual relationship covering business, personal, and medical matters had existed between the parties over a period of years, and that there was a display of confidence by each in the actions of the other. Dr. Edward's testimony is clear that he did not intend to make a gift to Center of the ground, and, it is clear that no monetary obligation existed on his part to Center. It is clear that greater credence to the sale theory must be given, in view of the fact that Center admitted he had dealt in real estate in small way—undoubtedly the doc-

tor was, in view of their friendly relationship endeavoring to give him some business. It is clear that Center planned to leave Denver, although he apparently never intended to come to Salt Lake City. Even after recording the deed to himself Center never manifested any interest in the lots, never paid any taxes thereon, never entered into possession—all that is clear. Manifestly Center's claim that the conveyance of the lots was the gift of the doctor for past services, is the flimsiest sort of pretext for claiming title. The testimony that the deed was a gift for services gratuitously rendered in connection with checking some oil leases or oil stock, and for which defendant Center never intended to charge, never rendered a bill, never made any claim, but piously "*hoped*" for something in return clearly fits in with the testimony made on his own behalf that the doctor treated him (Center) as a son, insofar as charging him in connection with medical services rendered—makes it all too clear and obvious that checking the items for the doctor was only a favor for past favors, and, clearly not an enterprise of great moment for which compensation could be garnered. It is all too clear that the doctor in giving him an advantageous position in fixing medical fees—would not certainly feel obligated to compensate him handsomely for a mere inquiry into the status of some oil investments. The contention of Center that the lots were given to him, for a prior transaction, is all too clearly a mere plausible attempt to hold onto the lots, and divide the value with the tax title claimant, Alliance Realty and Building Company, with whom he has teamed

up. It is clear, too, that Dr. Edwards without reference to Center's violation of his agreement, was clear and positive about the transaction, and the details thereof, and, the plaintiff here as his assignee stands in the same relative and unimpeachable position. All of the physical facts, lack of interest by Center, non-payment of taxes, non-user, non-concern about the lots, corroborate the plaintiff's position. Certainly, if Center's claim was substantial as to these lots, he wouldn't have to concede four-fifths of the interest to the defendant Alliance Realty and Building Company, he could quiet the title against the void tax deed in himself. The plaintiff's evidence is clear, convincing, and decisive, and warranted submission to the Court, sitting as a chancellor, of the meritoriousness of his claim for rescission.

(B) *The law on the quantum of proof to be supplied.*

At the outset, we are confronted with the general rule that parol evidence to vary the terms, conditions, or purposes of a writing may not be introduced, in the absence of a claim of fraud, mistake, or the like. The Utah rule is in accord. See *Fox Film Corp'n vs. Ogden Theater Co., Inc.*, (1932) 17 Pacific 2nd, 294, 82 Utah 279, 90 A.L.R. 1299, where the court says at page 296 Pacific:

“(1) In the absence of fraud or mistake, a conclusive rule to the effect that parol evidence is not admissible to vary, add to, or subtract from the terms of a valid written instrument is generally applied in cases of this kind * * *”

See also, *Starley vs. Deseret Foods Corp'n et al* (1938) 74 Pacific 2nd 1221, 43 Utah 577, at page 1223 Pacific:

“(1) In the absence of fraud, duress, or oppression, parol evidence will not be received to explain or modify an instrument, unless there is something on the face thereof, or in the language or signature creating an ambiguity or uncertainty * * *”.

Plaintiff here, is within the rule, since the contention is that failure to follow out the agreement was premeditated, and immediate as shown by recording the deed within four days after obtaining it, and therefore fraudulent.

True, the burden of proof is upon the party asserting the fraudulent conduct, and ordinarily it must be proven by the preponderance of the evidence. See section 531 and 532, (page 730) *Abbott on Facts*, 5th Edition (Viesselman); 2 *Jones Commentaries on Evidence*, 2nd Edition, Sections 546, 547, pages 1003-4; 24 *American Jurisprudence*, Fraud and Deceit, Sections 278, 279, and this rule is well stated in the Utah case of *Lane vs. Peterson* (1926) 251 Pacific 374, 68 Utah 585, at page 379 Pacific:

“* * * It is a well established rule of law that fraud is never presumed, that when a transaction is explainable upon the theory of honesty and fair dealing that theory will be adopted, ‘unless the evidence clearly preponderates in favor of the illegal aspect of the transaction’ * * *, ‘the burden of proving the alleged fraud must be established by clear and convincing evidence’.

Again, in *Nelson vs. Leamington Mines & Exploration Co.*, (1935) 48 Pacific 2nd 439, 87 Utah 69, at page 440 Pacific the court states:

“(1) * * * ‘in order to establish a charge of this character, the complainant must show by clear and decisive proof * * *’

However, despite the preponderance of the evidence rule, there are a great many expressions, such as clear preponderance, clear and convincing evidence, and the like, as set out in Section 278, 24 American Jurisprudence, Title Fraud and Deceit, but, the variation in language seems to be explainable upon grounds that,

“* * * perhaps the use of such descriptive expressions in stating the required proof of fraud in a civil case does no more than indicate an approval of the proposition that fraud cannot be founded upon doubtful, vague, uncertain, and inconclusive evidence, or upon mere suspicion or conjecture * * * The use of such expressions in every case has been attributed to the fact that fraud must ordinarily be proved by circumstantial evidence, and it has been suggested that the variations in the expressions used by the different courts indicate a view of what constitutes a burden of evidence rather than disagreement with the general rule that a preponderance of the evidence is sufficient to establish fraud in a civil case * * *”—24 Am. Jur., Section 278, Fraud & Deceit.

(C) *Enough evidence was produced to make an issue and require submission to the Court sitting as a chancellor.*

It has been stated (64 Corpus Juris 301, Section 317 (2), page 301)

“That the legal sufficiency of the evidence to take the case to the jury (or the chancellor in this case) is a question of law. * * * The question for the court is not whether there is literally no evidence, but whether there is no evidence which ought reasonably to satisfy the jury (or chancellor) that the fact is established. In determining the question, the evidence as a whole for the party having the burden of proof must be looked to, and that construction of the evidence most favorable to the party introducing it should be adopted with all reasonable inferences favorable to such party being drawn from it * * *”

When the Court made its decision in this cause, there was still before it (Rec. 90) defendants' motion to dismiss. In determining the latter, which is similar to a motion of non-suit, the following construction of evidence should be taken:

“(a) Assumption—The Court in passing upon the legal sufficiency of the evidence must assume the truth of the statements offered or made.

* * *

(c) Duty (1) It is the duty of the Court to decide as a preliminary question (legal), whether there is any evidence legally sufficient to be considered by the jury. * * *

(2) It is the duty of the trial Court, giving to the evidence the most favorable interpretation toward the party against whom the motion is directed, to determine whether

there are any facts of the evidence tending to support plaintiff's right to recover.

(3) When the testimony is before the Court, it is its duty to see that it has at least a natural tendency to sustain the allegations, and to warrant an inference of the fact to be proved, and if there is no sufficient evidence to justify an inference of the disputed fact, it should be withheld from the jury." Note 94a to Section 317, 64 Corpus Juris, 301.

Construing the evidence introduced in this cause by the plaintiff, in the light of the above rules, certainly there is a sufficient showing, taking the plaintiff's testimony in the most favorable light, to support his right of recovery, and he has sustained the burden of the evidence. Such is the Utah rule:

"(1) In determining the propriety of granting a motion for involuntary non-suit the evidence must be considered from a view most favorable to the party against whom the dismissal is sought * * * " Page 432, Utah Reports, Fidelity & Casualty Co. of New York vs. Middlemiss, 103 Utah 429, 135 Pac. 2nd 275, and

"(1) The question for determination in this case is whether the trial court erred in granting the motion for non-suit. To decide this question we must view the evidence in the light most favorable to the plaintiff. If plaintiff established by sufficient competent evidence each of the essential elements of his alleged cause of action to make out a prima facie case of liability, the court erred in non-suiting the plaintiff. If not the judgment should be affirmed * * * " — Page 510, Utah Reports, Oberg vs. Sanders (1947), 184 Pac. 2nd 229, 111 Utah 507.

It is submitted, that viewed in this light, the Court sitting as chancellor was required to pass on and decide on the preponderance of the evidence—a question such as would go to the jury, or the court sitting without a jury, or as chancellor, not as he did as a preliminary question, but on the merits of the case.

Preponderance of the evidence as defined in *Wilkinson vs. Anderson-Taylor Company*, (1904), 79 Pac. 46 28 Utah 346 is:

“By preponderance of the evidence is meant the greatest weight of the evidence, that which is more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although other things being equal it may be so determined * * *”.

(D) *The Court's Decision Affirmatively Shows a Sufficiency of Evidence to Warrant a Decision on the Merits.*

That the trial court sitting as a chancellor should have considered the matter on the merits is clearly shown from this statement in summation on page 108 of the record:

“The Court is of this view, that the testimony of the plaintiff shows, if it is true, that the man Center did not receive the property, did not pay the taxes; that he has given up his interest; that there is an adverse interest, that he has paid nothing for the property, except rendered a service for which he expected no pay; it was not a legal obligation.

“The Court is of the opinion that legally that is not sufficient; and so, that there is clear and convincing evidence that this deed should be set aside and declared to be an instrument of agency.

“Now the Court is ruling on this as a legal matter; not on a question of fact; and if the Court is in error, you can appeal it on that ground; * * *

Certainly, if the Court on the assumption of the evidence as above could so hold, then, it had the manifest duty of deciding the issue on the merits, not on the ground of failure to sustain the burden of proof, or insufficiency of the evidence to go to the Court or jury.

And, to hold to the theory that clear and convincing proof, or clear and precise proof, changes the preponderance of the evidence rule, or requires the compliance with the so-called numerical witness rule, of at least two witnesses, would be to deny, in every case, to parties who had advantage taken of them by another, without benefit of witnesses, any relief whatsoever, no matter how great a fraud or imposition may have been practiced or perpetrated upon them. That such is not an absolute rule, see:

Pender vs. Cook (1930), 150 Atlantic 892, 300 Pennsylvania 468, where it is said, at page 894:

“(5-6) Parol evidence to change, affect, or lessen the legal liability caused by the manner in which the names are placed on commercial paper can be considered only where fraud, accident, or mistake is shown, and must be of the

same quality as that which would reform a written instrument; that is, the evidence must be clear, precise, and indubitable, established by two witnesses, *or by one witness and corroborating circumstances.*”

and, again in *Mitchell vs. First National Bank of Confluence* (1939), 7 Atlantic 2d, 511, 135 Pennsylvania Superior 519, where the statement is made that it is sufficient if:

“(6-8) * * * resting upon the testimony of one supported, as in this case, by corroborating circumstances * * *”.

See VII Wigmore on Evidence 3rd Edition 259, Section 2034 (2), that:

“In general, the testimony of a single witness no matter what the issue or who the person, may legally suffice as evidence on which the jury may find a verdict.”

CONCLUSION

It was error to leave the plaintiff and appellant remediless, and deprive him of the fruits of a decision on the merits, on the weight of the evidence, by a holding that he had failed to sustain the burden of carrying the evidence.

WHEREFORE, plaintiff and appellant prays this Honorable Court to reverse the holding of the trial Court, and remand the same for further proceedings in accordance with the principles contended for herein.

Respectfully submitted,

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